Supreme Court, U.S.
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No. 10-1299

In the
Supreme Court of the United States

JOSEPHINE S. MILLER,
Petitioner,

v.

PRAXAIR, INC., ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

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REPLY

Unwittingly, Respondents' Opposition actually suggests that granting certiorari on the question presented is warranted and reveals that this case is a particularly appropriate vehicle for resolving the question.

Respondents' main argument is that granting review and eliminating the intent requirement would not change the outcome in this case because there is a separate constructive-discharge requirement of intolerable working conditions. But, as evidenced in the decision below and in decisions Respondents rely on, the Second Circuit's flawed emphasis on employer intent improperly affects its determinations whether the conditions are intolerable. Thus, not only is the intent requirement improper (and the subject of the circuit split), it has tainted the Second Circuit's approach to what should otherwise be an uncontroversial requirement to establishing constructive discharge. This case therefore presents the opportunity to clarify exactly how the constructive-discharge doctrine works—not just as to the intent requirement alone, but also as to the role, if any, such intent (or lack thereof) should play in concluding that the conditions are intolerable as a matter of law.

This Reply proceeds to make four brief rebuttal points: (1) the issue of intent was considered below; (2) the Second Circuit improperly relies on employer intent; (3) that improper reliance affected the outcome in this case; and (4) Miller explicitly argued that her working conditions were intolerable.

Certiorari should be granted.

1. The issue of intent was not only considered but emphasized below when assessing whether the conditions were intolerable.

Respondents first contend that the issue of employer intent was not considered below. But the Second Circuit explicitly considered it as part of its analysis of whether Miller could show intolerable conditions—in particular, the court emphasized that Respondents did not intend for her to resign because they asked her to stay at the company. After remarking that the conditions "largely amount" to disagreements that are insufficient to create intolerable conditions, the court relied on the lack of employer intent to fully assess the intolerable conditions and actually bar the claim: "[D]efendants made *repeated* attempts to convince her to stay, and, accordingly, no rational trier of fact could conclude that a reasonable person in her position would have felt that her employer deliberately sought to make her *working conditions so intolerable* that she had no choice but to resign." Pet. App. 5a (second emphasis added).

Respondents also note that the split in the circuits Miller "trumpeted" in the Petition was not argued in the Second Circuit. Opp. at 7. Of course it was not. The Second Circuit is bound to apply its own precedent—briefing the split in the circuits at that stage would simply call for the elementary rebuke that panels of the circuit courts cannot overturn their previous decisions. The reality is that this case comfortably fits within a recognized pattern of decisions that warrant this Court's review: A circuit is out of line with others on a recurring question, that

circuit continues to apply its own rule based on its own precedent, and this Court grants certiorari to resolve the split and decide what is the best rule. (On that last score, note that Respondents never actually defend the intent requirement.)

2. The Second Circuit (and others) adhere to the intent requirement.

Despite the Second Circuit's emphasis on lack of employer intent (as shown by Respondents' attempts to convince Miller to stay at the company), Respondents nonetheless say that it is "not clear" whether the Second Circuit still adheres to the intent requirement. For two reasons, Respondents' discussion on this point favors granting certiorari.

First, the Second Circuit heavily relies on employer intent, as shown by the decision here and by decisions Respondents raise. Take *Petrosino v. Bell Atlantic*, 385 F.3d 210 (2d Cir. 2004), for example: Respondents explain that "[t]he *Petrosino* court reviewed the evidence and, *while concluding that there was no deliberate attempt to force the plaintiff's resignation*, it ultimately rejected her predicate claim that working conditions were intolerable." Opp. at 11 (emphasis added). As in Miller's case, the Second Circuit puts great weight on the lack of employer intent, even to assess the intolerable conditions. The *Petrosino* court even emphasized similarities to its pre-*Suders* decision in *Pena v. Brattleboro Retreat*, 702 F.2d 322 (2d Cir. 1983), finding the intent issue to be crucial: "As in this case, there was no evidence that the employer wished the employee to resign her position." *Petrosino*, 385 F.3d at 231. Respondents also do not address Miller's point that district courts in the Second Circuit

continue to follow this approach. *See, e.g.*, Pet. at 16 (citing a recent district-court decision rejecting plaintiff's claim as a matter of law because of evidence that employer "wanted her to stay").

Second, even if we assume that the Second Circuit's position is simply "not clear," certiorari is appropriate precisely to ensure that there is clarity. Respondents do not dispute that the Fourth, Sixth, and Eighth Circuits have also followed a minority view endorsing the intent requirement. District courts are issuing decisions regarding constructive discharge approximately every day in this country. The legal standard should be clear and justified, and this Court has the opportunity to ensure that it is.

On that note, Respondents also wrongly state that this case involves "misapplication of a properly stated rule of law." Opp. at 12 (quoting Sup. Ct. R. 10). The whole point of the Petition is that the intent requirement leads to an improper rule of law—one that comprises an important federal question causing decisions by some circuits (e.g., the Second) to conflict with decisions of other circuits and this Court. *See* Sup. Ct. R. 10(a), (c). The conflict in the circuits is fully developed here, and the Second Circuit's particularly flawed emphasis on employer intent is revealed even by decisions Respondents cite.

3. In the Second Circuit, employer intent improperly affects whether the conditions are sufficiently intolerable, so it affects the outcome of this case.

Respondents also mistakenly claim that eliminating the intent requirement would not alter the

Second Circuit's decision in this case. They say that is true because the intent requirement has no effect on the independent question of whether the conditions were intolerable. Perhaps that is how it should be—but that is not how the Second Circuit approaches constructive discharge.

As noted, the Second Circuit improperly relies on the lack of employer intent to make its determination that the conditions are not intolerable as a matter of law. That is exactly what occurred here, when the court emphasized the Respondents' efforts to have Miller remain at the company as part of its conclusion that the conditions were not intolerable as a matter of law. That is also what occurred in *Petrosino*, where the court, following the *Pena* decision, relied on the lack of intent in concluding that the conditions were not intolerable. 385 F.3d at 231. In the Second Circuit's view, if there is no intent to force resignation, that fact weighs heavily when assessing whether the conditions were intolerable. If this Court grants review and concludes that this approach is not proper, the outcome in Miller's case would certainly change.

4. Miller explicitly challenged the Second Circuit's conclusion that the conditions at Praxair were not intolerable.

Respondents claim that Miller's Petition does not challenge the conclusion that her working conditions were not so intolerable that a reasonable person would feel compelled to resign. That claim is puzzling, as the Petition explains in detail how consideration of "conditions Miller faced shows that any reasonable person would have felt compelled to resign." Pet. at 20. The Petition then explained how Miller suddenly

became a target after vocalizing concerns about discriminatory conduct and was then subjected to insults that she was "thinking like a minority" and forced into unethical positions as in-house counsel. *Id.* at 21. The Petition also explained that, under a proper rule that did not put such undue weight on employer intent to establish constructive discharge, her claim would survive summary judgment. *Id.*

This case thus presents the opportunity for this Court to explicitly address the employer-intent requirement and to clarify the doctrine of constructive discharge—particularly as to whether such intent should weigh so heavily (as it did here and in other Second Circuit decisions) in assessing whether the conditions were intolerable. Miller's Petition explained why the intent requirement was illogical, and the Respondents have not defended it. This Court should correct those circuits that improperly continue to rely on employer intent.

CONCLUSION

The Petition should be granted.

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